SUPREME COURT, U.S.

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1272

G. I. DISTRIBUTORS, INC., ALVIN DRUSS, IRVING HERMAN,

Petitioners,

vs.

PATRICK MURPHY, Individually and in his Capacity as Police Commissioner of the City of New York,

FRANK S. HOGAN, Individually and in his Capacity as District Attorney of New York County,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Herald Price Fahringer, Esq.
Counsel for Petitioners
One Niagara Square
Buffalo, New York 14202
(716) 856-8400

Lipsitz, Green, Fahringer,
Roll, Schuller & James
of Counsel.

Daily Record Corporation
Rochester, New York
(228)

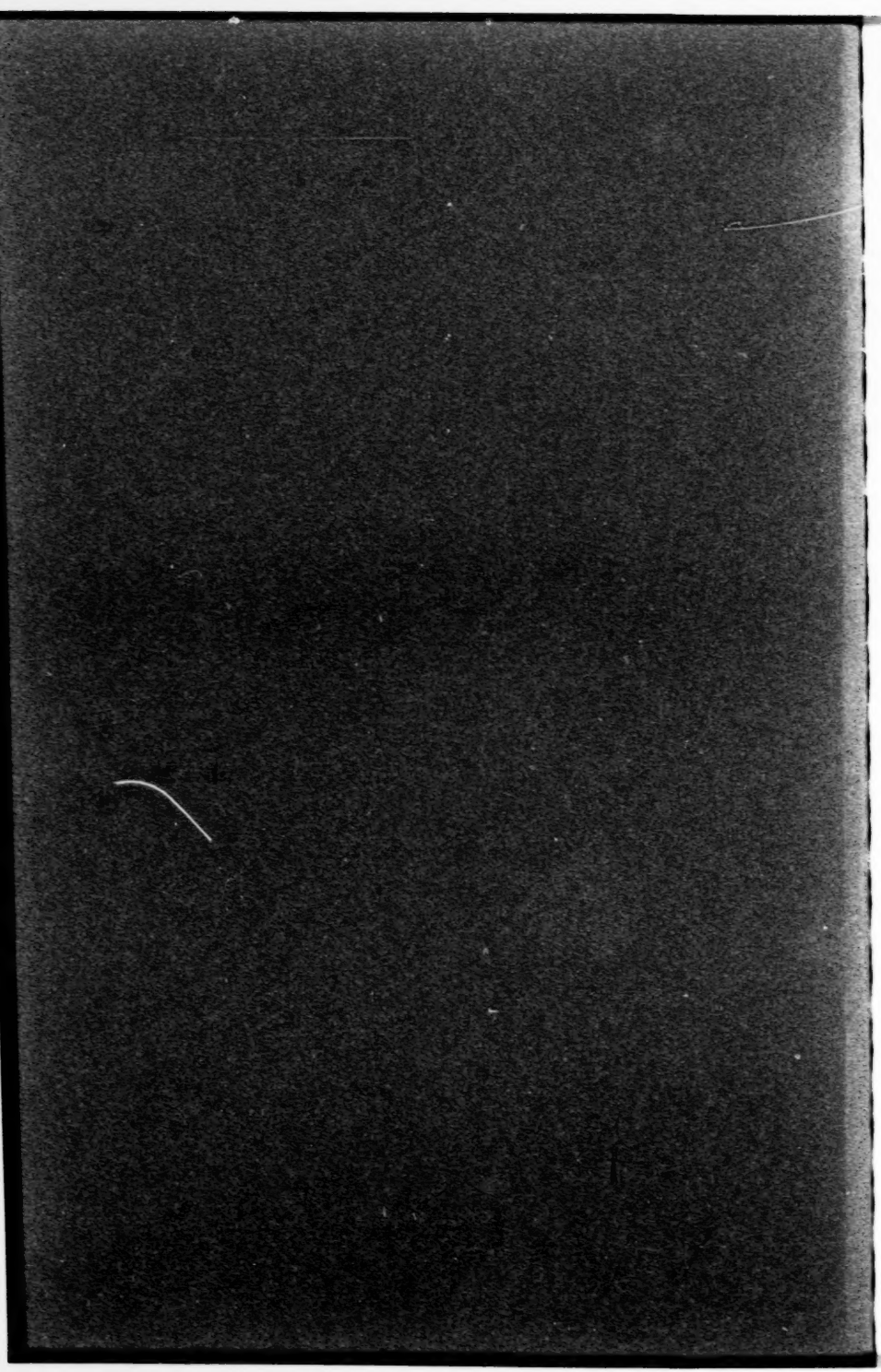

TABLE OF CONTENTS

	Page
Opinions Below	1
Question Presented	2
Constitutional Provision Involved	3
Statute Involved	3
Statement of Facts	4
Federal Intervention	6
The District Court's Decision	6
The Court of Appeals Decisions	7
Reasons for Granting the Writ	8
Conclusion	14
Appendix A — Supreme Court Memorandum June 25, 1973	A-1
Appendix B — Court of Appeals Opinion December 20, 1973	B-1
Appendix C — Court of Appeals Opinion November 14, 1972	C-1
Appendix D — District Court Opinion	D-1
Appendix E	E-1

Table of Cases

	Page
Demich, Inc. v. *Ferdon*, 426 F.2d 643 (9th Cir. 1970)	8
G. I. Distributors, Inc. v. *Hogan*, 336 F.Supp. 1036 (S.D.N.Y. 1972)	6
G. I. Distributors, Inc. v. *Murphy and Hogan*, 469 F.2d 752 (2d Cir. 1972)	7
Grove Press, Inc. v. *City of Philadelphia*, 418 F.2d 82 (3d Cir. 1970)	8
Heller v. *New York*, 413 U.S. , 93 S.Ct. 2789 (1973)	8, 9, 10
Marcus v. *Search Warrants*, 367 U.S. 717 (1961)	8
Metzger v. *Pearcy*, 393 F.2d 202 (7th Cir. 1968)	8
Milonas v. *Schwalb*, 65 Misc.2d 1042, 319 N.Y.S.2d 327 (Sup. Ct., N.Y.Co., 1971)	13
People v. *Abronovitz*, 62 Misc.2d 1069, 310 N.Y.S.2d 698 (Monroe Co. Ct., 1970)	9
Quantity of Books v. *Kansas*, 378 U.S. 205 (1964)	8, 10
Ricciardi v. *Thompson*, 480 F.2d 167 (7th Cir. 1973)	11
Roaden v. *Kentucky*, 413 U.S. , 93 S.Ct. 2796 (1973)	8
Sooner State News Agency v. *Fallis*, F.Supp. , (N.D. Okla., Dec. 3, 1973, 73-C-202)	11
Tyrone, Inc. v. *Wilkinson*, 410 F.2d 639 (4th Cir. 1969)	8
United States v. *Alexander*, 428 F.2d 1169 (8th Cir. 1970)	8

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The petitioners, G. I. Distributors, Inc., Alvin Druss and Irving Herman, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 20, 1973.

Opinions Below

This case was previously before the Court on a petition for a writ of certiorari (No. 72-872). The Court's memorandum is reported at 93 S.Ct. 3056 and is reprinted as Appendix A.

The Second Circuit Court of Appeals opinion dated December 20, 1973, attached as Appendix B, is still unreported. The Court of Appeals opinion of November 14, 1972, reproduced as Appendix C, is reported at 469 F.2d 752.

The District Court's opinion of January 19, 1972, attached as Appendix D, is reported at 336 F.Supp. 1036.

Jurisdiction

On January 19, 1972 the District Court, Weinfeld, J., in a §1983 proceeding, ordered the District Attorney to return all of G. I. Distributors' business books and records, as well as 19,000 magazines seized without a prior adversary hearing.

The Court of Appeals for the Second Circuit reversed the District Court order on November 14, 1972. The first petition for a writ of certiorari (No. 72-872) was granted. On June 25, 1973 the judgment was reversed and the case remanded to the Court of Appeals for further consideration in light of this Court's June, 1973 obscenity decisions. Despite the reversal, the Court of Appeals reaffirmed its original judgment of November 14, 1972 and sustained the massive seizure of 19,000 books without a prior adversary hearing.

This petition is timely filed, an extension having been granted by Mr. Justice Marshall on January 8, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the warrantless seizure of 19,000 magazines by the police, in addition to the taking of 330 needed for prosecution, without a prior adversary hearing, violated the petitioners' first amendment rights and authorized federal intervention under §1983 of Title 42.

Constitutional Provision Involved

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Statute Involved

42 U.S.C. §1983.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding or redress."

Statement of Facts

On January 6, 1972 a raiding party of New York City police officers swooped down on G. I. Distributors,[1] armed with a search warrant naming 24 specific magazines, issued *ex parte* by a judge of the New York City Criminal Court (6).[2] The police burst into the premises and began to ransack G. I. Distributors' offices and warehouse (6). While on the premises, the police seized other magazines, not named in the search warrant, and collected them so that they could be viewed by another Criminal Court judge (6, 7).

Later that evening, the Hon. Peter J. McQuillan came to G. I. Distributors' premises and, without the consent of any of the principals of G. I. Distributors or its employees, entered the premises not open to the public. He examined these magazines, and signed the second search warrant authorizing the seizure of six copies each of another 32 magazines (6). Consequently, 330 of G. I. Distributors' magazines (six copies of each) were confiscated and taken under the authority of these two *ex parte* search warrants.

The police then without any authority confiscated *all* remaining copies of the 55 magazines named in these two warrants, totaling 19,000 books. The magazines were packed

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[1]G.I. Distributors, located in Long Island City, New York, distributes over 1,600 different books and magazines throughout the New York City area. Among the books it distributes is a complete line of paperbacks, published by such companies as Dell Publishing Company and Fawcett Publications, the Arco Instruction Books, the Civil Service Testing Series, and science fiction, adventure, detective, romance, and western novels (5). It also distributes popular movie, detective, sports, hot rod magazines and comic books, as well as music magazines such as Downbeat; a complete horoscope series and all the standard world almanacs (5). G.I. also distributes nudist and girlie magazines (5).

Numbers in parentheses refer to the Appendix in the United States Court of Appeals for the Second Circuit.

[2]Of the 24 magazines named in the first warrant, only 23 could be found on the premises. The warrant only authorized the seizure of six copies of each magazine designated.

into 221 cartons, and police guards were stationed with them around the clock (7).[3]

The search warrants provided in the most general language that the officers could seize virtually all the business records of G. I. Distributors (9). Acting under the broad authority of these warrants, the police officers plundered G. I. Distributors' offices. They took all its business records, including inventory records, cash receipt books, general ledgers, check books, payroll books, all receiving records, and all its accounts payable (9, 10). Full file drawers were taken out of G. I. Distributors' premises which contained company records of firms which supplied it with all its publications. Most of the publications had nothing to do with the 55 magazines which were the subject of the criminal investigation (10).

By day's end, all G. I. Distributors' books and records had been carted off, 19,000 magazines had been seized, and the company's president and secretary-treasurer (Alvin Druss and Irving Herman) had been arrested (7). Within 24 hours, G. I. Distributors was completely paralyzed and was unable to distribute even a single copy of the 1,600 different publications which it regularly circulates (13).[4]

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[3]The next morning the District Attorney belatedly offered an adversary hearing to the petitioners in the New York City Criminal Court. Petitioners complained that the court had no jurisdiction to make such a determination since they were charged with felonies and, further, that an adversary hearing had to *precede* a seizure of this magnitude. The prosecutor then sought to proceed under the New York Civil Practice Law and Rules §6330 which authorizes the New York Supreme Court to enjoin the sale or distribution of obscene material. The proceedings were adjourned over the weekend. On January 10, 1972 the Criminal Court determined the magazines to be obscene and, in excess of its jurisdiction, authorized their confiscation. Later, the magazines were carted off by members of the New York City Police Department.

[4]The very next day, on January 7, the police struck again. This time they assaulted Data Affiliates, Inc., a company associated with G.I. Distributors and located in the same building. They seized all of Data Affiliates' business records, including every one of its electromagnetic computer tapes used in servicing its other customers (11). Data Affiliates is a concern supplying computer services to

[Footnote continued on following page]

Federal Intervention

With their business left in ruins and threatened with extinction, petitioners took refuge in the United States District Court for the Southern District of New York. They carefully avoided any interference with the state prosecution. Invoking §1983 of Title 42, G. I. merely demanded that all their business records and the 19,000 magazines be returned. Petitioners cautiously avoided asking for the return of the 330 magazines needed by the prosecution as evidence in the state criminal action (16).

Occupying the procedural high ground in federal court, petitioners launched a full frontal assault against the massive nature of this seizure. They claimed that it did not comport with governing constitutional principles because it was not preceded by an adversary hearing.

The District Court's Decision

Within one week Judge Weinfeld directed the return of the 19,000 magazines unlawfully seized and all G. I. Distributors' books and records.[5] The court held: "For the purpose of determining prior restraint, the plaintiff G. I. Distributors had already been effectively prevented from distributing its wares and the public from reading them." (336 F.Supp. at 1037; D-3, *infra*; footnote omitted.) Judge Weinfeld declared: "Unlike a mere possibility of a 'chilling effect' on the First Amendment

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G.I. Distributors and other companies in the New York area. As a result of this crippling seizure, Data Affiliates was completely disabled (11). The actual value of the tapes and other records taken from Data Affiliates by the police was approximately $7,000 (12). The People never appealed that portion of Judge Weinfeld's order directing the return of Data Affiliates' books, records and computer tapes.

[5] *G.I. Distributors, Inc. v. Hogan*, 336 F.Supp. 1036 (S.D.N.Y. 1972); Appendix D, *infra*.

freedoms, here there was a complete and total restraint upon the operations of a magazine distributor, the overwhelming majority of whose distribution could not constitutionally be prevented even after an adversary hearing." (336 F.Supp. at 1039; D-5, *infra*: footnote omitted.)

The Court of Appeals Decisions

The People, appealing to the Second Circuit Court of Appeals, wisely abandoned any claim that the District Court was wrong in requiring it to return all G. I. Distributors' business records, and the books and electronic tapes of Data Affiliates. They complained only about returning the 19,000 books seized in addition to the 330 copies of the same magazines taken for the purpose of prosecution.

The court, dramatically divided, concluded that it was constitutionally permissible for the police to seize the 19,000 books without a prior adversary hearing.[6] It held that the procedures used were constitutionally adequate since a post-seizure hearing was afforded the petitioners.

Circuit Judge Feinberg dissented, emphasizing the qualitative difference between mass seizures of first amendment materials and the seizure of a few copies for use as evidence. Judge Feinberg's principal concern was that case-by-case decisions of this sort would seriously endanger first amendment freedoms.

On December 20, 1973, the circuit court, considering the case on remand, reaffirmed its former decision. The court, Judge Feinberg dissenting, held that seizure of the 19,000 magazines was constitutionally acceptable because an adversary hearing

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[6] *G.I. Distributors, Inc. v. Murphy and Hogan*, 469 F.2d 752 (2d Cir. 1972); Appendix C, *infra*.

was offered the petitioners after the seizure. Consequently, petitioners are forced once again to petition for certiorari.

Reasons for Granting the Writ

The Second Circuit's unprecedented decision approving the police seizure of petitioners' 19,000 books without a prior adversary hearing is in direct defiance of this Court's decisions in *Heller* v. *New York*, 413 U.S. , 93 S.Ct. 2789 (1973); *Roaden* v. *Kentucky*, 413 U.S. , 93 S.Ct. 2796 (1973); *Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961). Although this Court's obscenity decisions of June, 1973 dramatically changed the substantive law of obscenity, in the realm of police procedures used to seize first amendment materials, the law was left basically intact.

This Court, over a decade ago, in an attempt to fix certain ground rules for the two warring American constituencies — those who sell sexy books and those who would regulate what the rest of us may read — devised the prior adversary hearing. The Court decreed that before there can be any interference with the distribution of books, an adversary hearing must be conducted to determine whether or not the challenged publications are obscene. *Quantity of Books* v. *Kansas*, *supra*; *Marcus* v. *Search Warrants*, *supra*.

This principle has become deeply woven into the fabric of the first amendment. Following this Court's leadership, virtually every circuit court in the country embraced and enforced this doctrine.[7] The Second Circuit is the first and only court to

[7] For example, prior adversary hearings have been required in *Grove Press, Inc.* v. *City of Philadelphia*, 418 F.2d 82 (3d Cir. 1970); *Tyrone, Inc.* v. *Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Metzger* v. *Pearcy*, 393 F.2d 202 (7th Cir. 1968); *United States* v. *Alexander*, 428 F.2d 1169 (8th Cir. 1970); *Demich, Inc.* v. *Ferdon*, 426 F.2d 643 (9th Cir. 1970).

break with this tradition and now stands alone against the rest of the nation.

The constitutional purpose of an adversary hearing intelligently conducted before the massive seizure of presumptively protected books is manifest. It provides a superior means of deciding the complicated issue of probable cause in an obscenity case where that decision must be made on the basis of a large volume of facts and law. As a practical matter, the adversary hearing is used as a means of supplying to the judicial officer publications found not obscene by high appellate courts which are similar to those sought to be seized. Once the magistrate is familiar with the material held not obscene by other courts, he is in a better position to decide whether or not the warrant should issue.[8]

In *Heller* v. *New York*, *supra*, this Court approved the confiscation of a *single film* for evidentiary purposes after a judge observed the film and issued a search warrant for its seizure. However, the Court carefully pointed out:

> "In this case, of course, the film was not subjected to any form of 'final restraint,' in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence*. There has been no showing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case, did temporary restraint in itself 'become a form of censorship,' even making the doubtful assumption that no other copies of the film existed." (93 S.Ct. at 2793)

In our case there was no authorization for the seizure of the 19,000 magazines, for the warrant only permitted the taking of six copies of each publication named. As a consequence, there

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[8] When an adversary hearing is avoided by the state, very often a magistrate issues a warrant for the seizure of books previously determined to be not obscene. As an example, in *People* v. *Abronovitz*, 62 Misc.2d 1069, 310 N.Y.S.2d 698 (Monroe Co.Ct., 1970), it was discovered after the seizure that three of the publications had been adjudicated not obscene in other courts.

was an unconditional restraint imposed upon the circulation of all these books for over a month.

Significantly, this Court in *Heller* galvanized its earlier holdings governing massive seizures established in *Marcus* and *Quantity of Books*.[9] Thus, this Court reinforced the adversary hearing rule relative to massive seizures. *Heller* only altered that rule to the extent that when the state seeks to prosecute a person criminally for the distribution of obscene materials, a limited seizure of the challenged material may be made for *evidentiary* purposes without a prior adversary hearing. Under those circumstances there is a minimal interference with the distribution of the questioned books and thus the determination of obscenity can await either a post-seizure hearing or the trial itself. However, if the state's objective is to abridge the circulation of a given work completely by destroying all of a distributor's books, a pre-seizure determination of obscenity is constitutionally required.[10]

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[9]The Court wrote:

> "Those cases [*Quantity of Books* and *Marcus*] concerned the seizure of large quantities of books for the sole purpose of their destruction, and this Court held that, in those circumstances, a *prior* judicial determination of obscenity in an adversary proceeding was required to avoid 'danger of abridgement of the right of the public in a free society to unobstructed circulation of nonobscene books.' *Quantity of Copies of Books* v. *Kansas*, *supra*, 378 U.S., at 213 . . . (1964). *We do not disturb this holding.* Courts will scrutinize any large-scale seizure of books, films or other materials presumptively protected under the First Amendment to be certain that the requirements of *Quantity of Copies of Books* and *Marcus* are fully met. 'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.' [Citing authority.]" (93 S.Ct. at 2794; emphasis supplied; footnote omitted.)

[10]This Court emphasized in *Heller:*

> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the

[Footnote continued on following page]

Here the District Attorney had acquired six copies of each magazine named in the warrants as evidence for the prosecution of his obscenity claims. The warrantless seizure of the additional 19,000 books, imposing a total restraint on their circulation, was concededly for the purpose of forfeiture.[11] Consequently, the narrow exception to the adversary hearing rule provided for in *Heller* has no application to this case. For in *Heller* this Court stressed:

> "... on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. *Otherwise, the film must be returned.*" (93 S.Ct. at 2795; emphasis supplied; footnotes omitted.)[12]

The Second Circuit's conclusion that G. I. Distributors was prevented from distributing its books for "a few hours" is woefully inaccurate. (Appendix B at B-4.) In fact, G. I. Distributors was foreclosed from distributing virtually *all* its publications because the police seized *all* of its business records, a fact regrettably overlooked by the circuit court. G. I.'s books and records and all of their computer tapes forcibly seized from

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seizure of the copy prevented continuing exhibition of the film." (93 S.Ct. at 2794-2795; footnote omitted.)

See Sooner State News Agency v. *Fallis*, F.Supp. (N.D. Okla., Dec. 3, 1973, 73-C-202), where a three-judge court, relying upon *Marcus* and *Quantity of Books*, ordered the return of all non-evidentiary copies of an entire warehouse of books and films seized by state authorities. The district court held that this Court's *Heller* decision permits only a limited exception to the prior adversary hearing requirement, and does not authorize massive seizures without a prior hearing on the question of obscenity.

[11] In the New York state proceedings, the District Attorney sought a warrant under §6330 of the Civil Practice Law and Rules which authorizes the destruction of any obscene material.

[12] *See Ricciardi* v. *Thompson*, 480 F.2d 167 (7th Cir. 1973).

Data Affiliates, Inc. were held for over a month.[13] It is most unfair for the Second Circuit to carve up this harrowing search and attempt to validate one part and ignore the other (the taking of all G. I. Distributor's books and records and Data Affiliates' computer tapes), which was conceded to be invalid. The search must be reviewed in its totality.

Judge Feinberg, upstaging the majority's logic, authoritatively pointed out:

> "The original warrants authorizing the taking of six copies of 56 magazines did not call for seizing *all* copies of the offending publications. To the extent that the seizure exceeded the specimens allowed by the warrants, it had *no* warrant authorization at all. . . . the Supreme Court held that warrantless seizures — such as occurred in the present case — were simply unconstitutional." (B-9)

Judge Feinberg went on to point out that:

> ". . . *Marcus* v. *Search Warrant*, . . . dealt with the seizure of thousands of magazines from a warehouse — just the kind of situation involved in the sequestration here. It is therefore clear that the 'urgency' claimed on these facts cannot, any more than the existence of 'cause,' justify the warrantless seizure of 19,000 publications, particularly since 'prior restraint' of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. [Citing this Court's opinion in *Roaden*.]" (B-10)

It is a serious insult to the scholarship of this Court to suggest that this high-handed confiscation of 19,000 books is authorized by *Heller*. When the prosecution elects to stop completely the distribution of all books, whether it be for a few days or for a

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[13] Judge Weinfeld's gripping description of this terrifying police seizure is worth reading and fully supports the conclusion that the business of G.I. Distributors, one of the largest distributors of magazines in New York, was crippled by this official seige. *See* Appendix D, *infra*.

month, such a disabling restraint must be preceded by an adversary hearing under the *Marcus-Heller* manifesto.

The token offer of an adversary hearing after all the damage is done is of little comfort to the victim of this official lawlessness.[14] We cannot resist stating that a major book distributor such as G. I. would not hide or burn 19,000 books sought by the police. These groundless fears expressed by the Second Circuit are unwarranted. With so much at stake, the petitioner would welcome a prior adversary hearing, for in the past it has usually prevailed on that question.

The devastation caused by the unleashing of this raw police power on book distributors cannot be tolerated in a free society. Assembled in our Appendix E is a catalogue of cases illustrative of this high incidence of police seizures and the inexcusable holding of books for long periods of time where ultimately they were returned or found to be protected. This sad list of cases critically demonstrates how a prior adversary hearing can balance the rights of the public to see and hear what they please with the state's right to prosecute obscenity. If a prior adversary hearing had been conducted in each of these cases, the inexcusable restraints imposed upon the distribution of protected books would have been avoided.

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[14] It bears repeating that the court in which the adversary hearing was belatedly offered the petitioners had no jurisdiction to hear this matter. *See Milonas* v. *Schwalb*, 65 Misc.2d 1042, 319 N.Y.S.2d 327 (Sup.Ct., N.Y.Co., 1971).

Conclusion

All that stands on the frontiers of the first amendment protecting the rest of us from this unforgivable police conduct of confiscating all of a merchant's books, is the prior adversary hearing. By terrorizing book distributors in this manner, the police become masters rather than servants of the law. If the Second Circuit's judgment condoning this conduct is allowed to stand uncorrected, more official lawlessness will undoubtedly be inspired. For it will only be a matter of time before other police agencies will swarm through this breach in the wall of the first amendment, rendered by the circuit court, and overrun other materials which are constitutionally protected. Today more than at any time in our history hostile forces are massed on the boundaries of this great amendment. If this breach in our Constitution is not immediately filled, free speech will suffer irreparable damage, and no book, film or magazine will be safe.

For all these reasons the writ of certiorari should be granted.

Dated: Buffalo, New York
February 18, 1974

Respectfully submitted,

Herald Price Fahringer, Esq.
Counsel for Petitioners
One Niagara Square
Buffalo, New York 14202
(716) 856-8400

Lipsitz, Green, Fahringer,
Roll, Schuller & James
of Counsel.